BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHY KUSH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,006,625
DOLLAR GENERAL STORES	)	
Respondent	)	
Self-Insured	)	

ORDER

Both claimant and respondent appeal the July 27, 2004 Award of Administrative Law Judge Robert H. Foerschler. Claimant was awarded a permanent partial general disability of 73.75 percent based upon a task loss of 47.5 percent and a wage loss of 100 percent. Claimant contends that she is permanently and totally incapable of employment and the Award should be modified accordingly.

Respondent contends on the other hand that claimant's permanent partial general disability should be reduced, arguing claimant's task loss should be limited to 47.5 percent pursuant to the opinion of Glenn M. Amundson, M.D., and that a wage of $340 should be imputed to claimant. The Appeals Board (Board) heard oral argument on November 2, 2004.

APPEARANCES

Claimant appeared by her attorney, Jeff S. Bloskey of Overland Park, Kansas. Respondent appeared by its attorney, John A. Pazell of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, the parties provided to the Board a stipulation dated November 5, 2004, agreeing that claimant's average weekly wage for the March 7, 2001 accident, including fringe benefits, is $413.72. This, pursuant to the

stipulation, translates to a compensation rate of $275.81. The Award, including any temporary total disability compensation awarded, will be modified to reflect the average weekly wage stipulation of the parties.

ISSUES

(1) What is the nature and extent of claimant's injury? More particularly, is claimant capable of earning a wage post injury or is she permanently totally disabled? Additionally, if claimant is not permanently totally disabled, what wage and task loss has she suffered pursuant to K.S.A. 44-510e? Finally, what functional impairment has claimant suffered as a result of the March 7, 2001 accident?

(2) Is respondent responsible to pay for the cost of pain management pursuant to the referral by Dr. Amundson to Mark B. Chaplick, D.O.?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant was working as respondent's store manager in Paola, Kansas, when, on March 7, 2001, she fell over a box, injuring her back, neck, legs and arms. The incident was reported to respondent, and claimant was initially treated by Dr. Dyck and also by Dr. Damon Dennis for chiropractic treatment. Claimant was later referred to Dr. Arnold by respondent, and ultimately came under the authorized treatment of Glenn M. Amundson, M.D., a board certified orthopedic surgeon. Dr. Amundson diagnosed a thoracic herniation, as well as recurrent injuries to the L5-S1 level in the lumbosacral spine. Claimant underwent a total of three surgeries to the low back with Dr. Amundson, including a laminectomy on November 1, 2001, a discectomy on November 25, 2001, and ultimately a fusion on March 28, 2002. Dr. Amundson released claimant from treatment for her thoracic and lumbar spine conditions on December 11, 2002, with restrictions.

Dr. Amundson examined claimant on March 12, 2003, June 13, 2003, and October 3, 2003, for her cervical spine condition. Dr. Amundson rated claimant at 36 percent to the body as a whole for the lumbosacral and thoracic spine conditions and rated her at 46 percent to the body as a whole when the cervical spine condition was included. He placed her on light duty restrictions involving 25 pounds or less of lifting on an occasional basis and 30 pounds or less carrying on an occasional basis, with the

recommendation that she limit pushing, pulling, climbing, stooping, kneeling, crawling, crouching and reaching activities to occasional only, meaning less than two and a half hours per day.

There was dispute during Dr. Amundson's deposition as to whether a referral was made to Mark B. Chaplick, D.O., for pain management services. During the deposition, Dr. Amundson discovered a note from Dan Ruiz, a physician's assistant from his office, acknowledging that Mr. Ruiz had spoken to Dr. Chaplick's office.

Dr. Amundson acknowledged that his file contained office notes from Dr. Chaplick, updating him on claimant's medical condition, which he noted was typical in a situation where he would make a referral. He also acknowledged that it would be typical for him to recommend pain management for someone in claimant's situation, with her ongoing problems and complaints. However, he agreed that there was no reference in the file to a specific referral from his office to Dr. Chaplick.

In treating the cervical spine, Dr. Amundson diagnosed mild degenerative disc bulging at C3-4 through C5-6, without focal disc herniation or spinal stenosis, but with foraminal narrowing C3-4 through C6-7 due to uncovertebral osteophytes, which he described as being bone spurs, with the most severe being at C4-5 on the right and C5-6 on the left.

Dr. Amundson was provided a job task list put together by Mary Titterington, a vocational expert, including 40 job tasks, of which he opined claimant was unable to perform 19, for a 47.5 percent task loss. He advised claimant to pursue Social Security disability, finding that her chances of finding a suitable job were improbable.

In his April 20, 2003 letter to claimant's attorney (Jeff Bloskey), Dr. Amundson opined that he was unable to say within a reasonable degree of medical probability whether claimant's cervical injuries were related to her work-related accident. He also agreed that nowhere in his medical records does he specifically state that, in his opinion, claimant is permanently and totally disabled.

Claimant was referred by her attorney to Edward J. Prostic, M.D., a board certified orthopedic surgeon, for evaluation on February 10, 2003. Dr. Prostic found claimant to have sustained injury to her spine, resulting in three operations at the L4-5 level, with discectomy and fusion, and also found abnormalities in her cervical and thoracic spine. He assessed claimant a 25 percent impairment on a functional basis pursuant to the AMA *Guides*,[1] and issued permanent restrictions, limiting claimant to lifting no greater than

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

25 pounds occasionally and 10 pounds frequently, and advised claimant avoid frequent bending or twisting at the waist, and avoid forceful pushing or pulling, the use of vibratory equipment and captive positioning. Dr. Prostic was provided the task list from Mary Titterington. Dr. Prostic testified that claimant was able *[sic]* to perform 28 of 40 tasks, which he described as a 70 percent task loss. However, in his report, it is noted that he stated that claimant was "unable" to perform 28 of 40 tasks. In both the report and the deposition, he assessed claimant a 70 percent task loss, which agrees with the report, rather than his actual testimony. The Board finds that Dr. Prostic's opinion was for a 70 percent task loss.

Dr. Prostic acknowledged that in his opinion, claimant was unemployable because of a combination of her restrictions and the prescription drugs she was taking. He agreed that the lifting restrictions he placed upon claimant were based upon an 8-hour work day, with nothing in his report to indicate claimant would be restricted from working a full 8-hour day. He also acknowledged that, in his report, there was nothing to indicate claimant was permanently totally disabled.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[2]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[3]

Dr. Amundson, claimant's treating physician, assessed claimant a 36 percent impairment to the body as a whole for the injuries to her thoracic and lumbar spine and a 10 percent impairment to claimant's cervical spine. He testified initially he was unable to verify that the injuries to claimant's cervical spine were related to the work-related injury of March 7, 2001, but later changed his opinion.[4] The Board will, therefore, award claimant

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[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] K.S.A. 44-510e(a).

[4] Initially, Dr. Amundson was unable to verify that the cervical injuries were related to the March 7, 2001 accident. However, in his testimony, he stated that after reviewing some medical records which were provided to him and based on his examinations and findings, he opined that within a reasonable degree of medical certainty, claimant appears to have suffered the onset and initiation of a cervical pain syndrome as a result of the March 7, 2001 accident (*see* Amundson Depo. at 17-18). Later on in his testimony, he talked about the records he received and how those records allowed him to make his determination that the cervical condition was related to her injury (*see* Amundson Depo. at 44-46).

a functional impairment of 46 percent to the body as a whole based upon the opinion of Dr. Amundson. The Board acknowledges Dr. Prostic's impairment is also in the record, but finds the opinion of the treating physician to carry more weight in this instance.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[5]

Claimant was assessed a task loss by both Dr. Amundson and Dr. Prostic. Dr. Prostic opined claimant unable to perform 70 percent of her previous tasks, with Dr. Amundson finding claimant unable to perform 47.5 percent of her previous tasks. The Board finds no justification in granting greater weight to one opinion over the other and, in averaging the two opinions, finds claimant has suffered a 58.75 percent task loss as a result of the injuries suffered with respondent.

K.S.A. 44-510e must be read in light of *Foulk*[6] and *Copeland*[7] with regard to what, if any, wage loss claimant may have suffered. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above quoted statute) by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage. In this instance, the Board finds *Foulk* does not apply, as claimant was laid off by respondent (with her last day of work being November 4, 2002) as a result of respondent's inability to accommodate the restrictions placed upon claimant by the authorized treating physician.

Respondent argues, however, that claimant has violated the policies set forth in *Copeland*, where the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual wages being received, when the

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[5] K.S.A. 44-510e(a).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

worker fails to make a good faith effort to find appropriate employment after meeting maximum medical improvement.

Claimant has provided substantial information on the amount of effort placed into her job search. It is obvious that rather than sitting at home, claimant has been out in the community, seeking employment, as evidenced by several exhibits admitted at the regular hearing showing the full extent of claimant's job search. The Board finds that claimant has proven by a preponderance of the evidence that she put forth a good faith effort to obtain post-injury employment and, therefore, the Board will not impute a wage pursuant to the policies set forth in *Copeland*, but instead finds claimant has suffered an actual wage loss of 100 percent as a result of the injuries suffered on March 7, 2001.

Claimant contends, in the alternative, that she is permanently totally disabled pursuant to K.S.A. 44-510c. While both Dr. Prostic and Dr. Amundson contend that claimant is incapable of future employment, they also both place restrictions on her which would allow her to return to the job market, and neither placed in their reports that they considered claimant to be permanently totally disabled. Both agree that it would be difficult to place claimant, but the Board does not find, based upon their restrictions, that claimant is incapable of obtaining employment. Additionally, respondent's expert, Terry Cordray, opined that claimant was capable of obtaining employment in the Kansas market.

Finally, the Board notes claimant's activities after leaving respondent's employment contradict her allegations of permanent total disability. Claimant began seeking employment almost immediately after her termination, when she began receiving unemployment benefits. As a result of applying for those benefits, claimant was obligated to seek employment on a regular basis. Claimant kept a detailed record of her attempts to find work and was, on one occasion, successful in finding work at the Louisburg Elementary School as a paraprofessional.

Claimant's attempts at employment are commendable. However, they do contradict her allegations that she is permanently and totally disabled. The Board, therefore, finds that while claimant is entitled to a work disability under K.S.A. 44-510e, she has not proven that she is permanently totally disabled and her award will be limited to a permanent partial general disability award.

In awarding claimant a permanent partial general disability, the Board, after averaging the task loss opinions of Dr. Amundson and Dr. Prostic, resulting in a 58.75 percent task loss, and averaging that task loss with claimant's 100 percent wage loss, awards claimant a 79.4 percent permanent partial general disability based upon the stipulated average weekly wage of $413.72.

The Board also finds that respondent is responsible to pay for the pain management treatment through Dr. Chaplick. While Dr. Amundson does not have specific recall of a referral, nor does he have specific referral papers in his file, he does have information to indicate a physician's assistant in his office, by the name of Dan Ruiz, did speak to Dr. Chaplick's office; Dr. Amundson has updated information from Dr. Chaplick, which would be normal in a referral situation; and he acknowledged that in the course of his practice he does regularly refer patients to Dr. Chaplick for pain management. The Board, therefore, finds the referral to Dr. Chaplick to have been authorized and respondent is responsible for the payment of the pain management costs as authorized medical treatment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 27, 2004, should be, and is hereby, modified, and claimant, Kathy Kush, is granted an award against the respondent, Dollar General Stores, for an accidental injury on March 7, 2001, based upon a stipulated average weekly wage of $413.72, for a 79.4 percent permanent partial general disability.

Claimant is awarded 37.46 weeks of temporary total disability compensation at the modified rate of $275.83 totaling $10,332.59, followed thereafter by 311.68 weeks of permanent partial general disability compensation at the rate of $275.83 totaling $85,970.69, for a total award of $96,303.28.

As of January 18, 2005, claimant is entitled to 37.46 weeks of temporary total disability compensation at the rate of $275.83 totaling $10,332.59, followed thereafter by 164.4 weeks of permanent partial general disability compensation at the rate of $275.83 totaling $45,346.45, for a total due and owing of $55,679.04, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 147.28 weeks of permanent partial general disability compensation at the rate of $275.83 per week totaling $40,624.24, until fully paid or further order of the Director.

In all other regards, the Award of Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of January, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff S. Bloskey, Attorney for Claimant
John A. Pazell, Attorney for self-insured Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director